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Supreme Court of the United States

October Term, 1948

No. 671

SAMUEL TITTO WILLIAMS,
Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellees.

Appeal From The Court of Appeals of The State of New York

APPELLEES' BRIEF

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Opinions Below

The Court of Appeals of the State of New York unanimously affirmed, without opinion, a judgment of the County Court of Kings County convicting appellant of murder in the first degree and sentencing him to death. (*People v. Williams*, 298 N. Y. 803, official weekly advance sheets, No. 510, February 5, 1949.)

Jurisdiction

The jurisdiction of this Court is invoked under Section 1257, subd. 2, of Title 28 of the United States Code, upon the ground that the Court of Appeals of the State of New York erred in upholding the constitutional validity of Sections 1044, 1045 and 1045-a of the New York Penal Law and Section 482 of the New York Code of Criminal Procedure.[1] Appellant's contention is that these statutes, as construed by the Court of Appeals, are repugnant to the Fourteenth Amendment to the Constitution of the United States, in that they authorize a trial judge to disregard the jury's recommendation of life imprisonment and to impose the death penalty "on the basis of information supplied by persons as to whom appellant had been afforded no opportunity for cross-examination or rebuttal, and with whom he had not been confronted." (Appellant's Brief, p. 14.) The amended remittitur of the Court of Appeals recites that the question "was presented and necessarily passed upon" and that the Court held "that neither the statutes nor the sentence aforesaid violated the Fourteenth Amendment of the Constitution of the United States" (R. 21-23).

[1] The statutes involved are set forth in Appendix A, *infra*.

Statement of the Case

Appellant was indicted for the crime of murder in the first degree (R. 1). On arraignment he was advised of his right to be represented by counsel, and being financially unable to retain a lawyer, the court assigned three attorneys to represent him (R. 1). About four months later he was brought to trial which lasted fourteen days (R. 1). The evidence established that he killed the deceased while engaged in the commission of a burglary (R. 13). In such circumstances, New York law permits the jury upon finding a verdict of guilty to recommend life imprisonment.[2] The jury's recommendation, however, is merely advisory, the court having discretion to refuse to follow it and to impose the death penalty.[3] The trial court so informed the jury when the case was finally submitted, the court saying (R. 3-4):

> "You must bear in mind that if you bring in a verdict of guilty as charged, without a recommendation, it means that the Court must impose the death penalty. On the other hand, if you bring in a verdict of guilty with a recommendation of life imprisonment, it means that the Court may impose a life sentence.
>
> "You must also understand that in the event you find the defendant guilty and recommend life imprisonment, that the Court is not bound to accept your recommendation."

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[2] N. Y. Penal Law, sec. 1045-a, quoted in Appendix A, *infra*.

[3] People v. Cole, 285 N. Y. 838; People v. Ertel, 283 N. Y. 519, 520.

The jury found appellant guilty as charged and recommended imprisonment for life (R. 1, 4). In accordance with established practice regulated by statute applicable to all cases, the court was required, before imposing sentence, to cause appellant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination, and was further authorized to "seek any information that will aid the court in determining the proper treatment" of the appellant.[4] Probation officers had to "fully investigate and report to the court in writing on the circumstances of the offense, criminal record and social history" of the appellant, and the court was required to "have such information before it prior to sentence or adjudication."[5]

After a pre-sentence investigation as above authorized was completed, the court held a pre-sentence hearing in which appellant and his counsel participated (R. 4-20). Appellant was asked whether he had anything to say why judgment should not be pronounced against him. He replied that he did not commit the crime (R. 5). The court then heard argument by each of appellant's attorneys who urged various reasons for accepting the jury's recommendation (R. 4-11). Thereupon, appellant was again asked whether he wanted to say anything, and when he replied that he did not commit the crime and was ready for sentence (R. 11-12), the court made a detailed statement (R. 12-20), setting forth its reasons why "the best interests of society would not be served by following the recommendation of the jury" (R. 19).

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[4] N. Y. Code Crim. Proc., Sec. 482, quoted in Appendix A, *infra*.

[5] N. Y. Code Crim. Proc., Sec. 931, quoted in Appendix B, *infra*.

The court noted that it gave the matter "grave and serious consideration" (R. 18), that it "searched for any facts which would justify the acceptance of the jury's recommendation" (R. 18) but "found nothing in (appellant's) favor" (R. 19), that his record stamped him "as a dangerous criminal" and a "menace" to society (R. 19), and expressed the opinion that "if the jury had before it the facts contained in the probation report, the recommendation would never have been made" (R. 19).

Before imposing sentence the court revealed in detail the information it had received from the probation department and other sources concerning appellant's background and prior misconduct. Appellant and his counsel were told that in evaluating the jury's recommendation the court considered the evidence given at the trial in the light of such additional information, which because of the rules of evidence could not be brought to the attention of the jury (R. 12-13).

Briefly stated, the information considered by the court was to the following effect: Appellant had been "in difficulties with law enforcement agencies since he was about 11 years of age" (R. 12); he "was on probation when the crime involved here was committed" (R. 12); he was "a full-time burglar" (R. 17) who committed about thirty burglaries in the same vicinity where the murder occurred (R. 14); when he was arrested the police found in his room "about eighteen pawn tickets and personal property which had been reported stolen" (R. 15) and which he claimed "was either won by him in crap games or bought by him from different men unknown to him" (R. 17); he was identified by a woman as the man who committed a burglary in her apartment where he stole a wrist watch and a

wallet containing some money, the wrist watch being one of the articles found by the police in his room (R. 16-17); he admitted the commission of this crime to the detectives who questioned him (R. 17); he was also identified by a seven year old girl as the perpetrator of a sexual attack committed upon her in her home (R. 17); the probation report further indicated that he was a "psychopathic liar" who was "permeated with psychosexual habits of thought and conduct" (R. 16); in the opinion of the police and the probation department he not only attempted to burglarize the home of the deceased, but also "probably attempted to ravish her" (R. 14); and finally, the probation department deemed him "to be a menace to society" (R. 18).

It is significant that although the court revealed the foregoing information, neither appellant nor his counsel made any claim that all or any part of it was untrue or inaccurate in the slightest respect. No request was made to be confronted with the witnesses supplying the information. Nor was any request made for an opportunity to offer rebuttal evidence. Since appellant and his counsel remained silent when confronted with the information above related, the court acted on its conclusion to reject the jury's recommendation and imposed the death penalty (R. 20).

When the case reached the Court of Appeals appellant raised the contention that Sections 1044, 1045 and 1045-a of the New York Penal Law and Section 482 of the New York Code of Criminal Procedure[6] violated the Fourteenth Amendment to the Constitution of the United States "in that they sanctioned or permitted the sentence of death

[6] The statutes are set forth in Appendix A, *infra*.

to be based upon information supplied by persons with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal" (R. 21-22). The Court of Appeals held "that neither the statutes nor the sentence aforesaid violated the Fourteenth Amendment of the Constitution of the United States" (R. 22).

Argument

Having been found guilty of murder in the first degree after a trial conducted in accordance with due process of law, it was within the court's discretion to reject the jury's recommendation of life imprisonment and to impose the death penalty.[7] Appellant concedes that in making this permissible choice the court could properly have based its sentence solely upon its own evaluation "of evidence already of record at the time of the jury's verdict".[8] He contends, however, that when the court obtained additional information subsequent to the jury's verdict to aid it in determining the appropriate punishment, the Fourteenth Amendment prohibited the court from relying thereon unless it confronted the defendant "with witnesses giving such testimony" and afforded him an "opportunity for cross-examination and rebuttal".[9]

In short, appellant's position is not only that the Fourteenth Amendment guarantees the right of confronta-

[7] *People* v. *Cole*, 285 N. Y. 838; *People* v. *Ertel*, 283 N. Y. 519, 220.

[8] Appellant's Brief, page 13.

[9] Appellant's Brief, page 13.

tion, cross-examination and rebuttal during the trial, but also during the proceedings on sentence. Due process of law, we are told, is not satisfied if a convicted defendant is represented by counsel and is given an opportunity to be heard in open court as to why judgment should not be pronounced against him, unless the court restricts its judgment to an evaluation of the social and moral implications of the evidence already presented to the jury. If further enlightenment is to be sought to aid in determining the social problem as to what is to be done with a defendant who stands convicted, the court, it is said, must give the defendant an additional trial.

Nor does this exhaust all of the rights that are necessarily embodied in appellant's interpretation of the Fourteenth Amendment. Appellant cannot escape the fact that when the trial court revealed the information received from the probation department and other sources, neither he nor his counsel made any claim that it was untrue or even suggested that the witnesses be called and subjected to cross-examination. If, for example, the information that he was "a full-time burglar" (R. 17) whose entrance into the home of the deceased "was the result of experience he had had on thirty other burglaries" committed "about two months prior to the murder" (R. 14) were untrue, it would be known to the appellant. His complete silence when confronted with this information in the presence of his counsel must be deemed as acquiescence in its truth or at least as an intelligent waiver of the assumed right to cross-examine the witnesses. Surely, the least any defendant must do, if he would annul a traditional practice as a denial of due process of law, is to show that in the particular case in which the practice is challenged

he was denied an opportunity to prevent an injustice. Under the facts involved, therefore, it would be essential to hold, if appellant's argument is to be sustained, that even though cross-examination and rebuttal may be waived at the trial, they become constitutionally indispensable at the time of sentence.

Apart from the question of acquiescence or waiver, however, appellant's contention, if held valid, would lead to a revolutionary change in long established practice, which thus far has not been held violative of due process. It is fundamental that the question of punishment within the limits prescribed by statute is controlled solely by the conscience and sound discretion of the trial judge. Appellant recognizes that in imposing sentence the court need not state the reasons which impelled it to exercise its discretionary power unfavorably to the defendant. He urges, however, that had such been the situation in the instant case, he would still maintain that he was denied due process of law, but would simply be in the unfortunate position of being unable to prove that the court relied on *ex parte* information. The difficulty with this contention is that it attempts to evade an unavoidable effect of the claimed constitutional right of cross-examination and rebuttal at the time of sentence. If a defendant has such right, no court could refuse to disclose its reasons for imposing a particular sentence and thereby bar the defendant from an opportunity to assert and prove that due process of law was violated. A defendant would be able to compel the court to disclose whether or not it was relying on information obtained from the probation department or any other source, and if so, to demand that the witnesses be called and subjected to cross-examination.

To adopt appellant's view of the Fourteenth Amendment, therefore, would mean that every defendant could demand two trials—one trial on the question of guilt and the second trial on the question of sentence. This would be so for the obvious reason that in determining the punishment to be imposed "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[10] That is why the New York statute, which appellant attacks as unconstitutional, authorizes the court to "seek any information that will aid the court in determining the proper treatment" of the defendant.[11] Substantially the same power is conferred by the Federal Rules of Criminal Procedure which "are intended to provide for the just determination of every criminal proceeding."[12] Rule 32 thereof provides, in part:

"(c) *Pre-sentence Investigation.*

(1) *When Made.* The probation service of the court shall make a pre-sentence investigation and report to the court before the imposition of sentence or granting of probation unless the court otherwise directs. * * *

(a) *Report.* The report of the pre-sentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances

[10] *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55.

[11] N. Y. Code Crim. Proc., Sec. 482, quoted in Appendix A, *infra*.

[12] Rule 2 of the Federal Rules of Criminal Procedure, 327 U. S. 821-876.

affecting his behavior as may be helpful in imposing sentence or granting probation * * *, and such other information as may be required by the court."

The foregoing requirements of the Federal Rules of Criminal Procedure clearly proceed upon the basis that a defendant is not entitled as a matter of constitutional right to test the information obtained as a result of a pre-sentence investigation by means of a trial with the right of cross-examination and rebuttal. If a defendant could demand such a trial, it is obvious that it might be made the occasion of delays and obstructions which would bring reproach upon the administration of the criminal law and even discredit "the great immunities assured by the Fourteenth Amendment." [13]

Apparently realizing the dangerous implications of his contention, appellant seeks to restrict the claimed constitutional guarantee of cross-examination and rebuttal at the time of sentence to capital cases only. In a non-capital case, says the appellant, "a judge may act on the basis of information obtained *ex parte* from probation reports or other sources", but urges that "in practical application the effect of the prohibition (that no person shall be deprived of life or liberty without due process of law) differs as between deprivation of life and deprivation of liberty." [14] Due process of law, however, may not be denied merely because liberty rather than life hangs in the balance. "Certainly due process shows no less solicitude for liberty than for life. A man facing a prison term may, indeed, have as much at stake as life itself." [15]

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[13] *Snyder* v. *Massachusetts*, 291 U. S. 97, 122.

[14] Appellant's Brief, page 22.

[15] Dissenting opinion in *Bute* v. *Illinois*, 333 U. S. 640, 681.

Enough has been said to bring to light the inherent weakness of appellant's position. It remains to point out that his contention stems from a failure to recognize "the distinction everywhere drawn between proceedings at the trial and those before and after" and from an attempt to identify the privilege of a hearing at the time of sentence with the privilege of confrontation "which is limited to the stages of the trial when there are witnesses to be questioned."[16] Proceedings on sentence do not constitute a trial nor any part of a trial in the sense in which a trial was understood at common law. This is evident from two considerations. In the first place, "When a court is prepared to pass sentence, there is no requirement that it shall take testimony to assist it in arriving at its judgment. It may, if it so desires, but that is a matter for the trial court alone to decide."[17] In the second place, traditional practice for many years permits a sentencing judge to rely on any information which would aid him in determining the appropriate punishment, even though such information would not be admissible on a trial of the issue of guilt or innocence. The rule is succinctly stated in *Stobble* v. *United States* (C. C. A. 7), 91 Fed. 2d 69, 71, as follows:

> "It seems to be the position of appellant that the court is not permitted to acquire any information other than what would be admissible on a trial before a jury. We know of no such law. After the court had found appellant guilty, it was quite proper for it to acquire any available information * * * which would.

[16] *Snyder* v. *Massachusetts*, 291 U. S. 97, 107, 128-129.

[17] *State* v. *Vennum*, 149 Wash. 670, 674.

enable it to properly determine the appropriate punishment."[18]

A case precisely in point is *Stephan* v. *United States* (C. C. A. 6), 133 Fed. 2d 87, certiorari denied 318 U. S. 781; rehearing denied 319 U. S. 783. In the case cited, the defendant was convicted for treason and was sentenced to death by hanging pursuant to Title 18, Sec. 2, of the United States Code, which provides that "whoever is convicted of treason shall suffer death; or, at the discretion of the court, shall be imprisoned not less than five years and fined not less than $10,000 * * *." In deciding to impose the death penalty, the court obtained information in Chambers concerning the defendant from representatives of the Federal Bureau of Investigation and the chief probation officer. On appeal the Circuit Court held (at p. 100):

> "The record indicates that these various interviews took place in the Chambers of the Judge. The information thus made available is set forth in great length in connection with the sentence. Appellant insists that this procedure was improper. We take judicial notice that the practice of presentence investigations has long been followed in district courts. See Tractenberg v. United States, 53 App. D. C. 396, 293 F. 476, 480; Stobble v. United States, 7 Cir., 91 F. 2d 69, 71; Sharp v. United States, 4 Cir., 55 F. 2d 227. See also Title 18, Ch. 22, Sec. 727, U. S. C. A., which makes it the duty of a corporation officer to investigate any case referred to him for investigation by the court and his further duty to perform such

[18] See also *Hunter* v. *United States* (C. C. A. 6) 149 Fed. 2d 710, 711; certiorari denied 326 U. S. 787; rehearing denied 327 U. S. 814; *Escoe* v. *Zerbst*, 295 U. S. 490, 492-493.

other duties as the court may direct. The Rules of Practice and Procedure in Criminal Cases, supra, 292 U. S., page 661, 54 S. Ct. XXXVII, under the heading '1. Sentence' also clearly recognize not only the propriety but the importance of such investigation. We think, however, that such information should have been disclosed to the Judge in open court and in the presence of appellant. Such appears to have been the practice in the cases cited. We think that the interest of convicted persons about to be sentenced is more carefully safeguarded by open hearings under such rules as the court may adopt. But the real question here is, whether upon the record as we find it, there was an abuse of judicial discretion in fixing the sentence and we find none."

This Court denied certiorari (318 U. S. 781) and denied a rehearing (319 U. S. 783).

Conclusion

It is respectfully submitted that appellant has not presented a substantial federal question and that the judgment of the Court of Appeals of the State of New York should be affirmed.

Dated, Brooklyn, N. Y., April, 1949.

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Appendix A

New York Penal Law, Sections 1044, 1045 and 1045-a:

Sec. 1044. Murder in first degree defined

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed:

* * *

2. By an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual; or without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise;

Sec. 1045. Punishment for murder in first degree

Murder in the first degree is punishable by death, unless the jury recommends life imprisonment as provided by section ten hundred forty-five-a.

Sec. 1045-a. Life imprisonment for felony murder; jury may recommend

A jury finding a person guilty of murder in the first degree, as defined by subdivision two of section ten hundred forty-four, may, as a part of its verdict, recommend that the defendant be imprisoned for the term of his natural life. Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life.

New York Code of Criminal Procedure, Section 482:

Sec. 482. If no sufficient cause shown, judgment to be pronounced.

If no sufficient cause appear to the court why judgment should not be pronounced, it must thereupon be rendered. Before rendering judgment or pronouning sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examination of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant.

Appendix B

New York Code of Criminal Procedure, Section 931:

Sec. 931. Investigation.

Probation officers when directed by the court shall fully investigate and report to the court in writing on the circumstances of the offense, criminal record and social history of a defendant, * * *. The court shall have such information before it prior to sentence or adjudication. * * *